IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

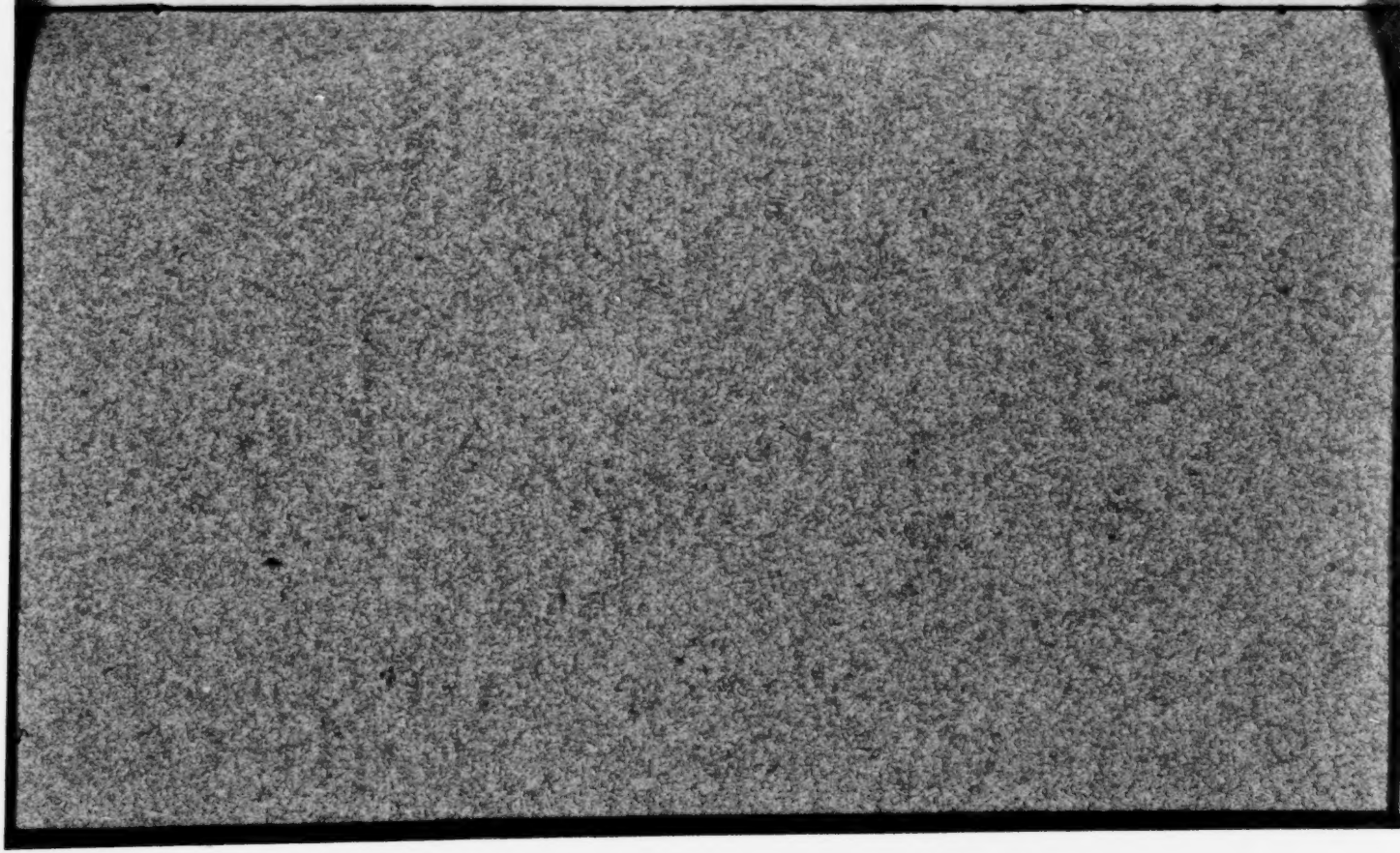
No. 249

HENDERSON WATER COMPANY, Appellant,

vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., CITY OF HENDERSON ET AL., Appellees.

MOTION TO ADVANCE FOR ARGUMENT OR HEARING TO THE SUMMARY DOCKET.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 851.

HENDERSON WATER COMPANY, APPELLANT,

vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., APPELLEES.

NOTICE OF MOTION TO ADVANCE FOR ARGUMENT OR TRANSFER TO THE SUMMARY DOCKET.

To the North Carolina Corporation Commission:

Hon. Dennis G. Brummitt, Attorney-General of the State of North Carolina; City of Henderson et al., and Its Counsel, Appellees.

The Henderson Water Company hereby gives notice that it will on Monday, March 9th, 1925, submit to the Supreme Court of the United States, at the Capitol, at Washington,

D. C., motion in the above entitled cause to advance the same for hearing, or to transfer to the Summary Docket.

A copy of said motion together with brief in support of the same being hereby delivered to you.

HENDERSON WATER COMPANY,
By JAMES H. BRIDGERS,
Of Counsel.

The foregoing notice is hereby accepted and delivery of a copy of the same together with copy of motion and brief in support of the same are hereby acknowledged.

This the 21st day of February, 1925.

DENNIS G. BRUMMITT,
Attorney General of the State of North Carolina.
PERRY & KITTRELL,
T. T. HICKS & SON,
Of Counsel for City of Henderson.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 851.

HENDERSON WATER COMPANY, APPELLANT,

vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., CITY OF HENDERSON ET AL., APPELLEES.

MOTION TO ADVANCE FOR ARGUMENT OR TO TRANSFER TO SUMMARY DOCKET WITH STATEMENT AND ARGUMENT OF THE COMPLAINANT, APPELLANT.

Now comes the Complainant, Appellant, by its counsel of record herein, and moves this Honorable Court:

1. To advance this cause for argument; or,

2. In the event the Court should refuse to advance for argument, the Appellant moves that said cause be transferred to the Summary Docket of this Court, for that the points involved in the case are of such character as not to justify extended argument.

HENDERSON WATER COMPANY,
By JAMES H. BRIDGERS,
Of Counsel.

Main Grounds of This Motion.

1. This was a motion for an Interlocutory Injunction in a suit in Equity pending in the District Court of the United States for the Eastern District of North Carolina, heard on the 22d day of September, 1924, under Section 266 of the Judicial Code, to restrain the North Carolina Corporation Commission and the individual members thereof and the City of Henderson and the individual members of its government from interferring with the complainant in collecting a higher schedule of water rates for services in the City of Henderson and adjacent thereto than it had been hitherto allowed to charge by the Corporation Commission of North Carolina.

2. The motion was heard by a Circuit Judge and two District Judges under the provisions of Section 266 of the Judicial Code, and denied without opinion by the Court on the ground that complainant had not sufficiently exhausted its remedies before the Corporation Commission of North Carolina.

3. That unless the case is advanced for argument or transferred to the Summary Docket the Complainant, Appellant will suffer irreparable loss and its rights under the Constitution of the United States denied.

BRIEF IN SUPPORT OF THE MOTION.

This suit was instituted by complainant in the United States District Court for the Eastern District of North Carolina on the 22d day of February, 1924, alleging that on account of additional duties imposed, and the rates allowed, its property was being confiscated; praying the Court to require the Corporation Commission of North Carolina to establish a schedule of rates that would yield a fair return upon the property of the complainant;

Complainant not being able to obtain a hearing upon the merits of its cause on account of the congested condition of the courts in the Eastern District of North Carolina, made an application under Section 266 of the Judicial Code and the same was heard on the 22d day of September, 1924.

If the complainant can make out its case it is suffering daily from confiscation under the rates to which it is now limited.

Authorities in Support of the Motion.

The complainant was clearly entitled to the Interlocutory Injunction under the authority of the Oklahoma Natural Gas Co. *vs.* Russell et al., 261 U. S., 290.

A confiscatory order can be enjoined pending appeal to State Supreme Court.

Gas Co. *vs.* Russell, *supra.*

A temporary injunction will be upheld on appeal when the balance of injury as between the parties favors its issue.

Prendergast *vs.* Telephone Co., 262 U. S., 43.

The North Carolina Commission is vested with the final legislative authority of the State in the rate-making process. Under Sections 1098 and 1101 North Carolina Consolidated Statutes, courts are without power to grant supersedeas and rates remain in effect until changed by the Corporation Commission.

N. C. Con. Stat., Sec. 1101.

> "Rates fixed by the commission, when approved or confirmed by the judgment of the Superior Court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the Supreme Court, if there shall be an appeal thereto, and until changed by the Corporation Commission."

Complainant was entitled to the Interlocutory Injunction sought under the authority of

Pacific Telephone & Telegraph Co. *vs.* Kuykendall, 265 U. S., 196.

An action may be brought in Federal Court to enjoin enforcement of rates based on the valuation of public utility, by Department of Public Works; proceedings in State courts for review of valuation not constituting a bar to proceedings in Federal Court.

Pacific Tel. & Tel. Co. *vs.* Kuykendall, *Supra.*

Complainant is entitled to resort to this court for relief.

Bacon *vs.* Rutland Railroad, 232 U. S., 134.

The highest court in North Carolina has held that all legislative and municipal grants in the nature of a contract are subject to regulation by the State, and that the same are

granted and accepted subject to the reserved power of the State.

In re Utilities Co., 179 N. C., 151.
Corporation Commission *vs.* Mfg. Co., 185 N. C., 17.

This court is asked to direct the District Court to issue the order upon such terms as to it the occasion requires.

The appellant is entitled to an order restraining the City of Henderson from prosecuting an action to lower the rates established by the Corporation Commission.

> "Where it becomes necessary to consider whether a State is depriving, or attempting to deprive, a litigant of property without due process of the law in violation of the 14th Amendment and the question turns on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms."
>
> Railroad Commission *vs.* Eastern Texas Railroad Co., 264 U. S., 79.

If the Constitution and Laws of the United States are to be enforced, this court cannot accept as final, the decision of the State tribunal as to what are the facts alleged to give the right or to bar the assertion of it even upon local grounds.

Davis, Director General *vs.* Wechsler, 263 U. S., 22.

The action in the State court must be enjoined to protect the decree of this court.

Respectfully submitted,

JAMES H. BRIDGERS,
Attorney for Appellant.

HENDERSON, N. C.,
February 21, 1925.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 249.

HENDERSON WATER COMPANY, APPELLANT,

vs.

THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA ET AL.

BRIEF FOR APPELLANT.

J. H. BRIDGERS,
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 249.

HENDERSON WATER COMPANY

vs.

THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA ET AL., THE CITY OF HENDERSON ET AL.

BRIEF OF THE HENDERSON WATER CO.

Statement of the Case.

The Henderson Water Company filed a petition to establish a schedule of rates for it to charge for public service furnished by it under the provisions of Sec. 1035 of the Consolidated Statutes of that State as set forth in Sec. XVIII of the bill (R., 9).

The Commission granted the relief appearing in Sec. XIV of the bill (R., 7).

On July 27, 1923, the Corporation Commission of North

Carolina modified its original order and reduced the rates heretofore allowed (R., 7, 8).

After a trial of six months the complainant filed its bill in United States District Court on February 22, 1924, and prayed the Court, among other things, to fix the present value of the complainant's property used and useful by the public and to direct the Corporation Commission to establish a schedule of rates for the use of the property of the complainant that will yield a net return of 8 per cent upon the present value of its property, and for such other and further relief.

The complainant waited six months after filing of its bill for a hearing upon the merits, and failing to get the case assigned for hearing filed its motion on September 13, 1924, for an interlocutory injunction in accordance with Sec. 266 of the Judicial Code of the United States (R., 41).

The matter was heard before a Special Statutory Court of three judges on the 22d day of September, 1924, which court, on September 27, 1924, denied the motion on the ground "that the complainant had not sufficiently exhausted its remedies before the defendant, The Corporation Commission of the State of North Carolina" (R., 57, 58).

Thereupon the complainant assigned error in denying the interlocutory injunction and brings the case to this court on appeal.

ARGUMENT.

The complainant relies for the jurisdiction of this court upon Bacon *vs.* The Rutland Railroad, 232 U. S., 134.

For an interlocutory injunction at this time it relies upon Oklahoma Natural Gas Co. *vs.* Russell, 261 U. S., 290.

A confiscatory order can be enjoined pending appeal to State Supreme Court.

Gas Co. *vs.* Russell, *supra.*

A temporary injunction will be upheld on appeal when the balance of the injury as between the parties favors its issue.

Prendergast *vs.* Telephone Co., 262 U. S., 43.

The complainant is entitled to the interlocutory injunction under the authority of Pacific Tel. & Tel. Co. *vs.* Kuykendall, 265 U. S., 196.

On the hearing before the three judges the Corporation Commission of the State of North Carolina did not file any answer to the motion. The City of Henderson filed an answer to the motion (R., 39).

This answer was a rambling alleged history of the case. The City of Henderson offered no proof whatever in support of its answer.

The complainant offered affidavit showing that the value of its property on October 1, 1920, was $380,578.11. (See Heimbach's affidavit, R., 53.)

It offered the affidavit of J. L. Ludlow showing the value of 1920 in November, 1922, of its water-works plant to be $255,060.00 (R., 52).

It offered the affidavit of Mrs. Effie K. Milne showing that $81,889.00 had been added to the property since the appraisal of 1920 (R., 49-50).

It offered the affidavit of its president showing that it was earning on the reproduction cost of its property for the year 1924 at the rate of 3.90 per cent per annum without any allowance for future inadequacy or any of the hazards of operation (R., 57).

Motion for Injunction in this Court.

If the appellant can sustain its contentions it has a loss of more than $6,000 per annum since it filed its bill and invoked the protection of the Federal Constitution against the wrongful act of a State.

This court held in the case of the Bluefield Water Works *vs.* Commission, 262 U. S., p. 679, that public service corporations invoking the protection of the 14th Amendment were entitled to the independent judgment of this court of the law in the facts.

Since this suit was instituted, the suit instituted by the City of Henderson by an appeal from an order of the Corporation Commission has been heard in the Superior Court of Vance County, and on appeal in the Supreme Court of the State, wherein it was held that the franchise granted by the City of Henderson *"was a contract made in subordination of the police power of the State, which may be rightfully invoked by either party thereto, and subject to a fair exercise of such power, is equally binding and obligatory upon all the parties thereto."*

The Supreme Court of the State, on June 24, 1925, held in said action that the City of Henderson had offered no evidence from which the jury could have found the facts under N. C. Statutes, C. S. Sec. 1068.

Commission *vs.* Water Company, 190 N. C., page 70;
128 S. E., page 465.

SEC. 1068.

How Maximum Rates Fixed.—In fixing any maximum rate or charge, or tariff of rates or changes for any common carrier, person or corporation subject to the provisions of this chapter, the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs.

The City of Henderson having elected to stand upon an asserted contract on the hearing before three judges, and having offered no proof on the merits, must now be considered as having confessed the bill *pendente lite,* and it, and for those for whom it speaks and seeks to represent as consumers, should be required to pay to the appellant the increased rates asked until such time as it is willing to submit itself to the court upon the merits of the proposition.

Under Banton, District Attorney, *vs.* Belt Line Railway

Corporation, decided in this Court May 25, 1925, 45 Sup. Ct. Rep., 534, appellant respectfully submits that it is entitled to a decision *per curiam*, with a mandate from this court, directing the District Court to issue the interlocutory injunction, as appellant made out a *prima facie* case. (See Record, pp. 49 to 57.)

Respectfully submitted,

JAMES H. BRIDGERS,
Of Counsel for Appellant.

HENDERSON, N. C., *October 15th*, 1925.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924. 1925

No. 249

HENDERSON WATER COMPANY, APPELLANT,

vs.

THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA, WM. T. LEE, GEO. P. PELL, ET AL., ETC., ET AL.

BRIEF OF APPELLEES ON MOTION TO ADVANCE AND PLACE ON THE SUMMARY DOCKET.

PERRY & KITTRELL,
T. T. HICKS & SON,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 851.

HENDERSON WATER COMPANY, APPELLANT,

vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., CITY OF HENDERSON ET AL., APPELLEES.

BRIEF OF APPELLEES ON MOTION TO ADVANCE AND PLACE ON THE SUMMARY DOCKET.

The City of Henderson, appellee, defendant in error, does not oppose the advancement of this cause or a summary hearing and decision of the same.

It respectfully submits that the appeal is without merit, and that the judgment of the three judges should be affirmed, or that the appeal should be dismissed.

The appellee, or defendant in error, shows that the Henderson Water Company, as appears by this record, furnished water to the City of Henderson under the terms of its contract for twenty-eight years, until the spring of the year

1922, three years after the peak of high prices had been passed, and for five years of that time, by its own admission, at prices less than the contract allowed it to charge for water.

The record further shows that the plaintiff in error appealed to the Corporation Commission of North Carolina in the fall of the year 1922 to be allowed to charge higher rates than the contract provided; that it obtained an order from the Corporation Commission as prayed; that by dilatory pleas it delayed for more than a year the hearing of the appeal of the City of Henderson from the determination of the Corporation Commission; that the same was determined in the Superior Court of the State in October, 1924, and has been heard on appeal, but not determined, by the Supreme Court of North Carolina; that pending the above-mentioned appeal from the Corporation Commission to the Superior Court the present action was begun and an injunction against further proceedings in the State courts sought from the judge of the District Court and refused, and later from the three judges, under Section 266 of the Judicial Code, and was also refused.

It is thus seen that the plaintiff in error has averred the constitutionality of the North Carolina rate-making laws and has received benefits under them in the form of a higher rate since April, 1923. It is also apparent that the State law of North Carolina confers upon the judges of said State full power to grant injunctions in all proper cases. See Consolidated Statutes of North Carolina of the year 1919, Section 851. Hence there is yet no occasion to appeal to the courts of the United States, and the decision of the three judges was correct.

THE INJUNCTION SOUGHT PROPOSES TO DETERMINE THE CONTROVERSY IN ITS INCIPIENCY WITHOUT A HEARING.

It is apparent from the allegations in the pleadings that a substantial controversy exists between the parties as to the right of the plaintiff under the contract to increase the rates, and that the facts upon which it bases its claim to that right are strenuously controverted by the City of Henderson. It would, therefore, seem that the determination of the controversy in advance by an injunction alleging the unconstitutionality of laws or procedure the protection of which the plaintiff has sought in this very proceeding, could not be for a moment considered.

If it shall be attempted upon the present status of this record to determine the controversy, it will undoubtedly be done without the evidence upon which the City of Henderson relies to support the allegations contained in its answer.

The procedure under the State law is clearly defined in Consolidated Statutes of 1919, Sections 1097 and 1103. In the first instance the Commission fixes the rate. The appeal to the Superior Court gives a trial of the whole matter *de novo*. The Superior Court adopts the rate fixed by the Commission or fixes a new one. The Supreme Court on appeal passes upon the validity of the acts of the Commission and of the courts below it, and the Corporation Commission finally fixes the rate under direction of the court, as shown by its decision. See the sections cited above and Corporation Commission *vs.* Manufacturing Company, 185 N. C., 17 (6), and pages 22 and 23. Plaintiff in error has not appealed from any of the orders entered by the State Corporation Commission or its courts.

The case of Prentiss *vs.* The Atlantic Coast Line Railroad,

211 U. S., 231, was an attempt to leave a proceeding pending in the Corporation Commission and State courts of Virginia, and this court held that the appellants should have proceeded to the end of the case in the State courts before resorting to the U. S. courts. On page 230 it is said: "It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State, in its final legislative action, would not respect what they think their rights to be before resorting to the courts of the U. S." And on page 232 of the Prentiss case the court said: "On the question of contract, as on that of confiscation, it is reasonable and proper that the evidence should be laid, in the first instance, before the body having the last legislative word."

The Prentiss case, page 231, shows that the North Carolina Corporation Commission act and the Virginia act were somewhat similar in their provisions relating to appeals. In the case of Pacific Telephone Company *vs.* Kuykendall, decided May 26, 1924, this court, by the Chief Justice, said: "It has done all it could to get relief and cannot get it." Clearly in this case the Henderson Water Company has not done what it could in its appeal to the State tribunals. This is just what the judges decided in this case that the appellant had not done: "That the complainant has not sufficiently exhausted its remedies before the defendant the Corporation Commission of the State of North Carolina."

THE CITY OF HENDERSON CONTENDS THAT THE WATER COMPANY IS BOUND BY THE CONTRACT AND CANNOT CHANGE THE RATES THEREIN PRESCRIBED DURING ITS LIFE.

The North Carolina Corporation Commission act was enacted in the year 1891 and has been several times since

amended. There is nothing in it giving the Corporation Commission the power to fix and establish rates to be charged by the water companies. This power was conferred by Section 1 of subchapter three of chapter 136 of the Acts of 1917, now Consolidated Statutes, Section 2783. The same act, chapter 1, Section 1, now Consolidated Statutes, Section 2778, expressly says: "Nothing in this act shall operately to repeal any local or special Act relating to cities and towns, but all such acts shall continue in full force and effect and in concurrence herewith unless hereafter repealed. * * * The provisions of this act shall not affect any act heretofore done, liability incurred, or right accrued or vested." The charter of the City of Henderson relating to the power to execute this water contract is found in the Laws of North Carolina of the Session of 1889, chapter 241 of the Private Laws, Section 24, page 993 of the book, viz: "That among the powers hereby conferred upon the commissioners they may borrow money, pledge the credit of the town, and contract debts for the improvement of the town * * * they shall have power to provide water and lights for said town and to contract for the same; provide for the cleansing and repairing of the streets; regulate the market; take all proper means to prevent and extinguish fires." The contract in this case expressly fixed the maximum rates to be charged for a period of 40 years from the year 1890, and provided for an extension for an additional forty years. The State was and is prohibited by Article 1, Section 10, of the U. S. Constitution from passing any law impairing the obligation of contracts.

The City of Henderson calls attention to the fact that the

appellant heretofore sought in the courts of North Carolina to avoid the obligation of this contract, and was told by the Supreme Court of the State, in the case of Water Company *vs.* the Trustees, 151 N. C., 171, page 177: "When the ordinance of the town was accepted by the plaintiff the execution of the contract was complete; by it valuable rights were granted the plaintiff and important duties imposed. An acceptance of those rights is an assumption of those duties. As it is a contract which binds the town not to interfere with those rights, so likewise it is one which binds the plaintiff to the discharge of those duties."

This court has said, in Southern Iowa Electric Company *vs.* Chariton, 255 U. S., 539: "Where, however, the public-service corporation and the governmental agencies dealing with them have power to contract as to rates and exert that power by fixing contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question whether such rates are confiscatory becomes immaterial." And in the more recent case of St. Cloud Public Service Corporation *vs.* St. Cloud, U. S. Advance Opinions, June 16, 1924, page 561, it is said: "And where a public-service corporation and the municipality have power to contract as to rates and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory becomes immaterial."

The City of Henderson contends that the contract suspends during its lifetime the governmental power of fixing and regulating rates.

The defendant in error, having in view the orderly procedure invoked by the plaintiff in the State tribunal and not yet ended, and the rule announced by this court that it will not presume that the courts of a State will disregard the Constitution of the United States, and that the appellant has, after proceeding for two years in the State courts, suddenly invoked the jurisdiction of the courts of the United States and sought an injunction from the three judges upon the allegation that the State courts and rate-fixing tribunals of the State were or would deprive appellant of its constitutional rights, has considered that its duty upon the hearing of the application for an injunction would be best discharged by maintaining as best it could that the procedure in the State court was and is constitutional and legal; and has not attempted to show upon the hearing of this motion its evidence upon the question of the correctness of the rates sought to be established. Defendant in error contends that no rates should be fixed or determined until the testimony shall be heard in support of the allegations contained in its answer, but that on this appeal the only questions that may be considered are the constitutionality of the procedure in the State court and the binding force of the contract plaintiff deliberately made and observed for so many years and now seeks to evade.

BENNETT, HESTER, PERRY,
PERRY & KITTRELL,
T. T. HICKS & SON,
Attorneys for The City of Henderson,
Defendant in Error.

HENDERSON, N. C., *March* 3, 1925.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 249

HENDERSON WATER COMPANY, APPELLANT,

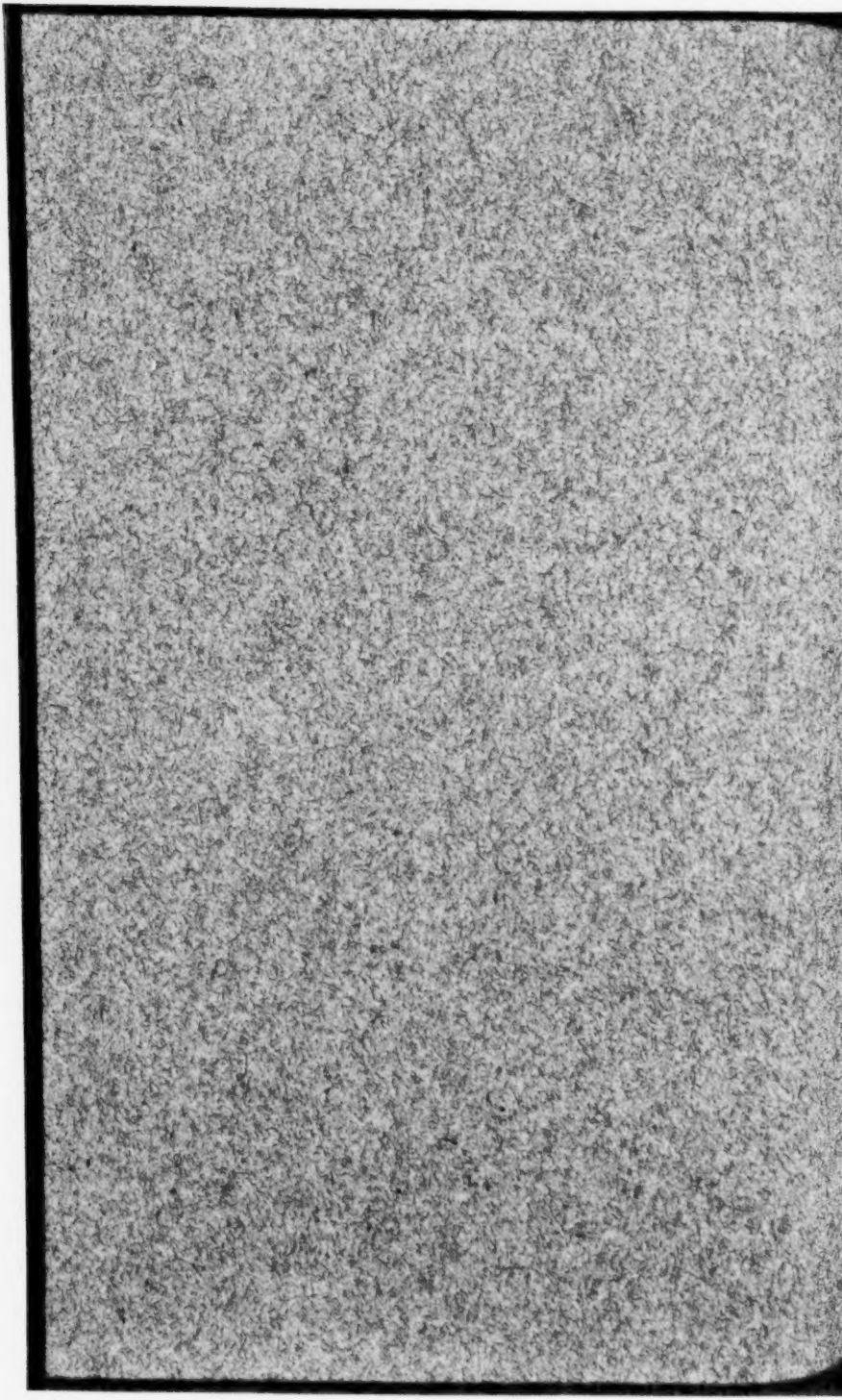
vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., CITY OF HENDERSON ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR THE CITY OF HENDERSON, APPELLEE.

BENNETT HESTER PERRY,
PERRY & KITTRELL,
T. T. HICKS & SON,
Counsel for the City of Henderson, Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 249

HENDERSON WATER COMPANY, APPELLANT,

vs.

NORTH CAROLINA CORPORATION COMMISSION ET AL., CITY OF HENDERSON ET AL., APPELLEES.

BRIEF FOR THE CITY OF HENDERSON, APPELLEE.

Reference to Appellee's Former Brief.

The former brief of appellee herein, dated March 3, 1925, is perhaps erroneously labeled. Appellee did not oppose the motion to advance, but in that brief gave some reasons why the decision of the three United States judges should be affirmed if this court should decide to place the appeal on its summary docket.

Brief Statement of Facts.

Plaintiff has supplied the defendant water for 35 years and claims the right under its franchise to supply it 45 years more. It failed in its duty in 1921 and receivers, duly appointed, took charge of the plant and supplied water. After the discharge of the receivers, plaintiff applied to the Corporation Commission, under the authority of a State law,

for an increase of the rates fixed by the franchise and obtained it, over the objection of the defendant; but the defendant appealed to the State courts, where the water company, while receiving the advanced rates, having succeeded in delaying the hearing twelve months, began the present action in the District Court of the United States at Raleigh, alleging a very great value of its plant and an inadequate income, and prayed the United States court to stay the action of the Corporation Commission and the State court, whose jurisdiction plaintiff had invoked, and to appraise plaintiff's property at a great sum and to fix rates such as plaintiff considered adequate.

The United States District Court declined to enjoin the State court, and before the bill could be heard on its merits plaintiff applied to a Circuit Judge and two District Judges to enjoin the Corporation Commission and the State courts from further proceeding with plaintiff's suit; and plaintiff went further and offered affidavits to the three judges to show what it considered to be the value of its 34 years old plant, whose useful life is fixed by State law, Consolidated Statutes of 1919, Section 2942 (3), at 40 years, and asked the three judges to then and there fix a still higher tariff of rates to suit the plaintiff.

None of the defenses set up in the answer of the defendant and none of the evidence of the defendant were before or were considered by the three judges, who, having heard the matter and "taken time for advisement and being of opinion that complainant has not sufficiently exhausted its remedies before the defendant, the Corporation Commission of the State of North Carolina" unanimously denied the application.

Printed Record, page 58.

ARGUMENT.

"The fact that a majority of the three judges of the District Court denied the interlocutory injunction suggests the want of merit in the application here."

Cumberland T. & T. Co. *vs.* La. Public Service Com., 260 U. S., 219.

And, on the same page:

"without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases might arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record and can pass on the issue without additional labor."

The Question of Rates Should be First Tried in the District Court.

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunction should issue, and as that question has not yet been considered, the case should be remanded to that court with the directions to proceed with the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below." Citing authorities.

Oklahoma Natural Gas Company *vs.* Russell, 261 U. S., 293.

Plaintiff submitted to the rates of which it now complains for more than thirty years, until 1922, long past the peak of war prices; for five years of that period, ending in 1917, at less than the contract rates. See answer, paragraph

9, page 34 of the printed record. Plaintiff was allowed by the Corporation Commission, in 1923, a large increase in rates, which the Superior and Supreme Courts of the State affirmed. See 190 N. C., 70; and plaintiff has had since December, 1924, an application for a still greater increase in rates pending before the Corporation Commission. This it has not seen fit to bring to a hearing. With this history in view it would seem that plaintiff should be willing to adopt the suggestions of this court quoted above and abide the orderly procedure in the District Court by first trying there the merits of its case. Plaintiff has certainly obtained relief under the State law, and it has not done all that it could to obtain more relief there, for it is still doing. To have exhausted its efforts and failed in the State tribunals was necessary before resorting to the remedy by injunction in the U. S. Court.

Oklahoma Gas Co. *vs.* Russell, 261 U. S., 293.
Pacific Tel. Co. *vs.* Kuykendall, 265 U. S., 204.

The statement of the case of Branton *vs.* The Belt Line, decided by this court May 25, 1925, 268 U. S., —; 69 L. Ed., 616, on the first page of the opinion, shows that the action had been pending nearly five years; that it had been referred to a master, who reported, and that his report was confirmed by the District Judge. The case in Supreme Court was on appeal from a final decision on the merits by a court of competent jurisdiction.

Can the Relief Asked be Granted under Sec. 266 of the Judicial Code?

The injunctive relief allowed under Section 266 must be based "upon the ground of the unconstitutionality of the

statute." The State Corporation Commission Act has long been held to be constitutional. Plaintiff does not claim that it is not constitutional. Plaintiff invokes the aid of the three judges and this court on appeal because the Commission and the State courts will not agree with the plaintiff, in advance of a trial, that plaintiff's property is worth as much as plaintiff says it is. In order, however, for plaintiff to invoke the aid of the 14th Amendment to obtain a judicial decision that the North Carolina law is unconstitutional, it must first obtain, by due process of law, in the District Court a finding that its allegations of the value of its property are true. That finding or conclusion is far ahead of plaintiff. Defendant did not understand that such issue was properly before the three judges and therefore did not offer evidence to them upon the issue it considered under the rulings of the Supreme Court, cited above, properly triable by the District Judge.

If defendant understands plaintiff's contention it is:

> "The State law and the administrative order are unconstitutional because they will not allow me to charge for water as much as I think I am entitled to, based upon my *ipsi dixit* of the value of the property used in supplying the water."

Section 266 covers the cases in which a statute or administrative order may be seen upon its face to be violative of the Constitution and not those in which plaintiff is forced to say "if you find the facts to be so and so, the Constitution is violated." Plaintiff is in the position of one trying to use a speaking demurrer, which is not allowable. Plaintiff does not attack the constitutionality of the North Carolina law,

but the correctness of a verdict rendered by the court on a question of fact raised by the plaintiff. Therefore Section 266 has no application.

The *status quo* must continue as it has for 35 years, until plaintiff shows its right, upon a trial on the merits, to change it.

Are Not the Contract Prices for Water Controlling?

Defendant contends (see answer, Sections 8 and 9, page 34 of printed record), based on the language of the town charter and the franchise of plaintiff, that the rates agreed on between the parties in that franchise are controlling.

The authority of the defendant to grant the franchise is the charter found in Private Laws of North Carolina, 1889, chapter 241, Section 24:

> "They (the Commissioners of the town) shall have the power to provide water and lights for the said town and to contract for same."

Section 18 of the franchise of plaintiff, found out of the printed record, reads:

> "This ordinance shall become binding as a contract upon said town of Henderson in event the said grantees shall on or before the 16th day of March, 1892, file with the town clerk of said town of Henderson their written acceptance of the terms, obligations, and conditions of this ordinance, and upon the filing of the approved bond, in the sum of $5,000, for the faithful completion of the said works within the time hereinbefore provided, and thereupon this ordinance shall constitute and become a contract and shall be the measure of the rights and liabilities of said town of Henderson and the said grantees."

Upon this contract and the authority to make it, defendant ites the following authority:

> "Where, however, the public-service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."
>
> Southern Iowa Electric Co. *vs.* Chariton, 255 U. S., 539.

The recent case of St. Cloud Pub. Service Company *vs.* St. Cloud, 265 U. S., page 355, holds:

> "And where a public-service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial."

Citing

Southern Iowa Elec. Co. *vs.* Chariton, 65 L. Ed., 764; 255 U. S., 539;

Paducah *vs.* Paducah R. Co., 261 U. S., 267; 67 L. Ed., 647;

Georgia R. and Power Co. *vs.* Decatur, 262 U. S., 432; 67 L. Ed., 1065.

The North Carolina Supreme Court on the Meaning of this Contract.

It is true that defendant city, when plaintiff's petition for increase of rates was first before the Corporation Commission of the State of North Carolina, and again on appeal in the

Superior and Supreme Courts of the State, took the position that the contract prices were binding for the life of the contract and was each time overruled. (See Corporation Commission *vs.* Water Company, 190 N. C., page 70.) Upon that ruling below the city asked the judge to hold that it was released from all and every obligation and liability under the contract. The judge refused to so hold and the Supreme Court on appeal held (190 N. C., page 74):

> "This proposition of law is not material to this controversy, and is not presented on the record. We do not therefore decide the question presented by this assignment of error."

The City of Henderson contends, on the authority of the Chariton and St. Cloud cases, quoted above, and upon the language of the charter of the city and the contract and the language of Article 1, Section 10, of the U. S. Constitution, prohibiting any State from passing "any law impairing the obligation of contracts," that the rates fixed by this contract cannot be changed during its life; that the power of regulation is suspended during that time.

The City of Henderson further contends that the North Carolina Legislature never intended to confer on the Corporation Commission, nor the State courts on appeal, the right to regulate or change the rates in this case.

The North Carolina Corporation Commission was created by the Legislature in the year 1891. Then and long afterward it was named the Railroad Commission. It was later given its present name and several times its powers were extended. It never had any authority to regulate the rates of the water companies until by chapter 136, Section 1, subsection 3, of the Acts of the Legislature of the year 1917, now in Consolidated Statutes of 1919, Section 2783. The

same Act expressly states, subchapter 1, Section 1, now Consolidated Statutes, Section 2778:

> "Nothing in this Act shall operate to repeal any local or special Act relating to cities and towns, but all such acts shall continue in full force and effect and in concurrence herewith unless hereafter repealed. * * * The provisions of this Act shall not affect any Act heretofore done, liability incurred or right accrued or vested, etc."

Section 1066 of Consolidated Statutes of North Carolina is the rate-fixing Act prior to that of 1917, and it does not mention water companies. It is plain from C. S. Sections 1098, 1099, and 1101 that the authors of the Act had in mind railroads only.

Defendant submits that it has demonstrated that plaintiff is bound by the contract, until terminated, to furnish water at the contract rates.

If in this we are mistaken, we think the defendant has shown that plaintiff should be required to prove to the District Court by competent evidence that it is entitled to a higher rate before it will be permitted to receive it.

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HENDERSON, N. C., *October* 31, 1925.

Service accepted and copy received October 31, 1925.

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